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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER YOSHIDA et al., Defendants and Appellants.	B263484 (Los Angeles County Super. Ct. No. BA418391)

APPEAL from judgments of the Superior Court of Los Angeles County, Dennis Landin, Judge. Affirmed as to Yoshida; reversed as to Ramirez.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Alexander Yoshida.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Isaiah Jeremiah Ramirez.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Michael R. Johnsen and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Alexander Yoshida and Isaiah Jeremiah Ramirez appeal from the judgment after their convictions for the first degree murder of Andrew Stittiams. We affirm the judgment against Yoshida, and reverse the conviction of Ramirez based on our Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*).

FACTS

On the afternoon of November 11, 2013, Stittiams and his friends James Villalobos and Nicole R. were walking together along Figueroa Street towards Stittiams's house a few blocks away. A car traveling in the opposite direction passed by, and the front passenger "flipped [Stittiams and his companions] off" and yelled something like "Fuck you." Stittiams took off his shirt and, according to Villalobos, "threw his arms up." The car made a U-turn and drove back past Stittiams and his friends. As the car passed, one of the occupants asked, "Where you fools from?," which Villalobos and Nicole R. interpreted as asking what gang they were a part of. Stittiams stepped off the curb and replied, "What the fuck. We're not from nowhere. Why are you flipping us off?" The occupants said, "This is our hood."[1]

The car continued past and turned around again. It pulled up next to Stittiams, and the front passenger, a male in his 20's,

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1 Nicole R. testified that Stittiams removed his shirt after this exchange, rather than before the first U-turn.

immediately jumped out and started swinging his fists at him. Stittiams fought back and gained the upper hand—Villalobos stated Stittiams "was whupping [the passenger's] ass" and saw that the passenger was bleeding from his nose.[2] Villalobos saw the driver, a male in his 20's, reaching for something inside the car. The driver got out with a knife in his hand and walked towards Villalobos.

As the driver was approaching Villalobos, Stittiams, still fighting with the passenger, yelled "Knife!" and started running up the street holding his stomach. Villalobos saw blood, and ran after Stittiams. The driver yelled at the passenger to get back in the car. The two men drove off. Villalobos called 911 and he and Nicole R. attempted to help Stittiams, who had fallen to the ground, his intestine protruding from his stomach. Stittiams died from multiple stab wounds.

During the police investigation, Villalobos identified appellant Yoshida in a photographic lineup as the passenger who had stabbed Stittiams.[3] Appellant Ramirez acknowledged in a statement to police that he was the driver of the car and present at the incident.

The People offered evidence at trial that Yoshida and Ramirez were members of the Highland Park gang.

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[2] Villalobos told the police that Stittiams was trained in kung fu.

[3] At trial, Villalobos asserted that Yoshida was not in fact the person who stabbed Stittiams. This discrepancy is not relevant to our holding.

PROCEDURE

The amended information charged Yoshida and Ramirez with the murder of Stittiams. (Pen. Code, § 187, subd. (a).)[4] It alleged that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(4).) Further enhancements were alleged against Yoshida for use of a deadly or dangerous weapon and for a prior conviction. (§§ 667, subds. (a)(1), (b)-(j), 667.5, subd. (b), 1170.12, 12022, subd. (b)(1).)

The jury found defendants guilty of murder in the first degree and found the gang enhancement to be true. The jury found the weapon allegation to be true as to Yoshida. The trial court found Yoshida's prior conviction allegation to be true.

Yoshida was sentenced to 56 years to life, and Ramirez was sentenced to 25 years to life. The court additionally imposed fines and awarded credits. Yoshida and Ramirez timely appealed.

DISCUSSION

Yoshida and Ramirez raise numerous claims of error by the trial court. Each is discussed below.

1. Failure to Instruct on Voluntary Manslaughter Based on Sudden Quarrel

Yoshida contends that the trial court erred by not instructing the jury on the lesser included offense of voluntary manslaughter based on a sudden quarrel theory. We reject this argument.

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[4] All further statutory references are to the Penal Code unless otherwise indicated.

A court is required to instruct the jury sua sponte on any and all lesser included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 160.) Voluntary manslaughter on a theory of sudden quarrel or heat of passion is a lesser included offense of intentional murder. (*Id.* at pp. 153-154.) A lesser included offense is supported by the evidence if there is evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, was committed. (*Id.* at p. 162.)

A defendant cannot rely upon a sudden quarrel theory when he initiates a conflict. As the Court of Appeal explained in *People v. Oropeza* (2007) 151 Cal.App.4th 73 (*Oropeza*), "A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion. The claim of provocation cannot be based on events for which the defendant is culpably responsible." (*Id.* at p. 83; accord, *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312.) This is so even if the actions of others had some role in instigating the conflict. In *Oropeza*, for example, the conflict began when a vehicle cut off the vehicle in which the defendant was riding. (*Oropeza*, at p. 83.) The defendant encouraged the driver of his vehicle "to follow the offending vehicle at a high rate of speed" after which defendant and his companions "engage[d] in highly aggressive driving and abusive personal behavior." (*Ibid.*) Ultimately, someone fired a shot from the defendant's vehicle and killed a passenger in the other vehicle, a crime for which the defendant was found guilty. (*Id.* at p. 76.) Although the Court of Appeal agreed that the evidence suggested that the defendant

had "acted in the heat of passion" and "showed an abundance of human weakness, it was not of a type such that the law is willing to declare his acts less culpable." (*Id.* at p. 83.) The court acknowledged that a reasonable person might be angered by being cut off, but would not then encourage the subsequent pursuit and aggressive behavior that resulted in a murder. (*Ibid.*) Thus, the trial court did not err in declining to instruct the jury on voluntary manslaughter based on sudden quarrel or heat of passion. (*Ibid.*)

Oropeza is analogous to the present case. Here, all evidence before the trial court pointed to Yoshida as the aggressor. The conflict began when Yoshida flipped Stittiams and his friends off. Even accepting arguendo that Stittiams had a role in exacerbating the situation by removing his shirt, throwing his arms in the air, and exchanging heated words, it was Ramirez and Yoshida who declined the opportunity to drive away and avoid the incident, and instead pulled up to the curb at which point Yoshida jumped out and attacked Stittiams. Yoshida cannot claim provocation any more than the defendant in *Oropeza* could claim that he was less culpable for his actions because his vehicle had been cut off.

The cases cited by Yoshida are inapposite because all involve evidence that someone other than the defendant provoked the fight. In *People v. Elmore* (1914) 167 Cal. 205, the victim instigated the conflict by bullying someone the defendant was trying to protect, challenging the defendant to a fight, then rushing at the defendant and hitting him. (*Id.* at pp. 207-208.) In *People v. Millbrook* (2014) 222 Cal.App.4th 1122, there was evidence that, inter alia, the victim had been acting belligerently towards the defendant's girlfriend and others, that the victim

escalated the fight with the defendant, and that the victim had clenched his fists and lunged at the defendant before the defendant had shot him. (*Id.* at pp. 1139-1140.) And in *People v. Ramirez* (2010) 189 Cal.App.4th 1483, there was evidence that the victim provoked the defendant by punching him, although the portion of the opinion analyzing the voluntary manslaughter instruction was not published. (*Id.* at p. 1487.)

Under these circumstances, the trial court properly declined to provide to the jury an instruction on voluntary manslaughter based on a theory of sudden quarrel or heat of passion.

2. Failure to Instruct on Defense of Another

Ramirez argues that substantial evidence supported instructions on both defense of another and imperfect defense of another, and the trial court erred in not providing these instructions. We reject this argument.

Defense of another, like self-defense, is applicable when a defendant actually and reasonably believes he must defend another person from imminent danger of death or great bodily injury. (See *People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) It is a complete defense to a charge of murder. (*Id.* at p. 996.) But if the defendant's belief is *unreasonable*, he may only claim *imperfect* defense of another. (*People v. Trujeque* (2015) 61 Cal.4th 227, 270.) This "is not a true defense, but a shorthand description for a form of voluntary manslaughter." (*Id.* at p. 271.) Voluntary manslaughter based on imperfect defense of another is a lesser included offense to murder. (*Ibid.*)

During trial, Ramirez's counsel requested an instruction of defense of another, arguing there was evidence that Ramirez

jumped out of the car with a knife in order to defend Yoshida, who was being beaten by Stittiams. The court declined to give the instruction, but suggested it might rule differently if Ramirez or another witness provided additional testimony. Ramirez did not testify, nor did defense counsel call any additional witnesses to testify as to the circumstances of the altercation between Yoshida and Stittiams. The court did not instruct the jury on defense of another.

The trial court did not err. It is well established that a defendant cannot claim self-defense or defense of others, whether perfect or imperfect, if that defendant's "own wrongful conduct (for example, a physical assault or commission of a felony) created the circumstances in which the adversary's attack is legally justified." (*People v. Booker* (2011) 51 Cal.4th 141, 182.) Here, all evidence indicated that after an exchange of heated words and gestures with the victim, Ramirez turned his car around and pulled up to the curb so that Yoshida could attack Stittiams. Ramirez could have driven away, but he did not. Thus, Ramirez was Yoshida's partner in initiating the combat. Under these circumstances, Stittiams was legally justified in defending himself by fighting back; the fact that he may have gained the upper hand did not erase that justification. It was not error for the trial court to refuse to give an instruction on defense of another.

3. Admission of Codefendant's Statement to Police

Ramirez contends the admission of Yoshida's statement to the police violated Ramirez's Sixth Amendment right to confrontation under *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*). We reject this argument.

The *Aranda*/*Bruton* rule bars the admission of a defendant's out-of-court statement incriminating a codefendant, even if the court instructs the jury to consider the statement only against the declarant. (*Bruton*, *supra*, 391 U.S. at pp. 126, 135-136; *Aranda*, *supra*, 63 Cal.2d at pp. 529-530.) The statement may be admissible, however, if it is edited to omit "not only the [co]defendant's name, but any reference to his or her existence." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211; see *People v. Lewis* (2008) 43 Cal.4th 415, 454, overruled on other grounds by *People v. Black* (2014) 58 Cal.4th 912, 919-920.) The editing requires something more than "simply replac[ing] a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration," since such techniques are insufficient to disguise the fact that the statement refers to the codefendant. (*Gray v. Maryland* (1998) 523 U.S. 185, 192-193.)

The jury here was shown an edited video of Yoshida's statement, and also provided with a transcript redacted to reflect the edits in the video. Other than a reference to Yoshida "dropping Isaiah's girlfriend off" on the day of the homicide, all mentions of Ramirez's name had been eliminated. Ramirez contends that the redactions were insufficient, both because his first name was mentioned once, and because other aspects of the statement confirmed the existence of another perpetrator that could only be Ramirez. Ramirez claims that Yoshida's statement "implicated Ramirez by placing Ramirez in the car and on Figueroa at or around the time of the [homicide]."

We note that defense counsel approved the transcript after the prosecution made several requested changes, and raised no objections when the video and transcript were presented to the

jury. Thus, Ramirez has forfeited this claim on appeal. (*People v. Hill* (1992) 3 Cal.4th 959, 995, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Even had defense counsel made a timely objection, we would find no basis to reverse. We need not decide whether the edited video and transcript satisfy *Aranda* and *Bruton*, because even assuming Yoshida's statement was admitted in error, it was simply cumulative of other properly admitted evidence. As Ramirez acknowledges, at most Yoshida's statement confirmed that Ramirez was in the car with Yoshida on Figueroa around the time of the homicide. But Ramirez himself confirmed as much in his own statement to the police, which was also presented to the jury. Ramirez described being in the car when words were exchanged with two men and a woman walking down the street. He described a "black guy" taking off his shirt. He described "jump[ing] out," seeing "the black guy running away," at which point he "jump[ed] back in the car [and] took off." He confirmed that he had a knife in his hand when he got out of the car. When the interrogating officer said, "The only thing I know for sure a hundred percent you were there," Ramirez responded, "Yeah." In short, Ramirez's statement put him at the scene far more decisively than anything Yoshida said. Given this evidence, the admission of Yoshida's redacted statement could not have affected the outcome of Ramirez's case.

4. Insufficient Evidence of Gang Enhancement

Yoshida and Ramirez argue that there was insufficient evidence that the crime of which they were convicted was committed for the benefit of a "criminal street gang" as defined in section 186.22. Specifically, they argue that the prosecution failed to establish that the "primary activities" of the Highland

Park gang included commission of one or more enumerated felonies, as required under section 186.22, subdivision (f). We reject this argument.

"On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' " (*People v. Snow* (2003) 30 Cal.4th 43, 66.) This standard applies whether direct or circumstantial evidence is involved. (*Ibid.*)

Section 186.22, subdivision (f) states, in relevant part: "As used in this chapter, 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the [enumerated] criminal acts . . . ." The enumerated acts include, inter alia, robbery; unlawful homicide or manslaughter; sale and manufacture of controlled substances; and burglary. (§ 186.22, subd. (e).)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony . . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Showing that members of the gang only occasionally commit the enumerated crimes would not be sufficient. (*Id.* at p. 323.)

Here, Los Angeles Police Officer Arshavir Shaldjian offered testimony regarding the activities of the Highland Park gang that, in the aggregate, provided sufficient evidence that its members consistently committed enumerated criminal acts. He testified that approximately 50 members of the gang "go out and actually commit crimes on a daily basis. They do anything from vandalism all the way to murder. So you have those guys who actually go out and put in work for the neighborhood, for the hood." Shaldjian noted that the gang claimed certain territory as its own; when asked why this was important to gangs, he said, "Territory is everything. You get that piece of real estate, that turf, area, you control drug sales, control your crimes, burglaries, robberies, everything. You control that territory. That's your area to freely go out there to commit crime and represent your neighborhood."[5] Asked how a homicide such as the one committed here might benefit a gang, Shaldjian said, "If you're afraid to call the police every time they do a crime out there, every time they tag a wall, rob somebody, beat somebody, kill somebody, you don't come forward and testify, well, they win because that crime goes unsolved . . . . [¶] What happens now is you have all these gang members running around committing crimes, and nobody is out to testify against them. . . . They are out freely committing what they need to do, putting in work for

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[5] Yoshida argues that Shaldjian's statement regarding territory referred to gangs in general rather than the specific activities of the Highland Park gang. But Shaldjian's statement immediately followed his description of the territory specifically controlled by the Highland Park gang. In context, the jury would reasonably understand that Shaldjian's discussion of the importance of territory applied to the Highland Park gang.

the neighborhood." Shaldjian also testified regarding four murders for which Highland Park gang members were convicted.

While Shaldjian never specifically stated that any of the enumerated acts were "primary activities," his testimony clearly established that the commission of crimes was a frequent, even daily, activity for Highland Park gang members, and the bulk of the examples he offered were enumerated criminal acts such as murder, drug sales, burglaries, and robberies. Shaldjian's testimony could not reasonably be interpreted as suggesting that those enumerated crimes were only occasional; indeed, he characterized them as "putting in work for the neighborhood," implying that committing those crimes was, in essence, the gang members' job.[6]

Yoshida cites *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*), in which the Court of Appeal held that there was insufficient evidence to satisfy the primary activities element. *Alexander L.* is distinguishable. In that case, a deputy sheriff testified as a gang expert regarding the Varrio Viejo gang. (*Id.* at p. 611.) Speaking of the gang's primary activities, the deputy said, " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' "

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6 Yoshida argues that the evidence of the four murders was insufficient to prove that gang members consistently and repeatedly committed murder. Regardless of whether the evidence of those four murders was in itself sufficient to prove the primary activities element, it corroborates Shaldjian's other testimony about the activities of the Highland Park gang, including the fact that active members commit murder.

(*Ibid.*) On cross-examination, the deputy testified that the vast majority of cases he knew of involving Varrio Viejo were graffiti-related. (*Id.* at p. 612.) The Court of Appeal noted that the deputy did not discuss "the circumstances of these crimes, or where, when, or how [the deputy] had obtained the information." (*Id.* at p. 612.)

The court also found that the deputy's testimony lacked foundation, because "information establishing reliability was never elicited from him at trial." (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 612.) Defense counsel in fact raised an objection on this basis, which the Court of Appeal stated should have been sustained. (*Id.* at p. 612, fn. 4.)

Unlike the deputy in *Alexander L.*, Shaldjian testified extensively as to his qualifications and experience, thus providing a foundation on which the trial court could assess the reliability of his testimony. Among other things, Shaldjian testified that he had served for four years on the gang enforcement detail and was specifically assigned to the Highland Park gang. He had spoken with fellow officers about gangs in Northeast Los Angeles, collaborated with the Federal Bureau of Investigation and the federal Bureau of Alcohol, Tobacco and Firearms regarding gang members, and had "[c]onducted numerous probation, parole checks at gang locations, gang hangouts and [would] continuously stop gang members on a regular basis." He testified that he had been involved in over 100 gang-related investigations, and had regular encounters with Highland Park gang members, sometimes on a daily basis. Unlike in *Alexander L.*, defense counsel raised no objection to Shaldjian, nor were his qualifications challenged on cross-examination.

Shaldjian also provided much stronger evidence than the deputy in *Alexander L.*, who did not speak to the frequency of the crimes of which he testified and admitted that most of the crimes of which he was aware were graffiti-related. (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 611.) In contrast, Shaldjian spoke of 50 active gang members committing crimes on a daily basis, and included a list of examples the vast majority of which were enumerated felonies. The weaknesses undercutting the validity of the expert testimony in *Alexander L.* do not exist in this case.[7]

The record thus establishes that there was sufficient evidence that the primary activities of the Highland Park gang included enumerated criminal acts under section 186.22.

5. Exclusion of Victim's Toxicology Report

Ramirez argues that the trial court erred in not admitting evidence that the victim, Stittiams, had methamphetamine and marijuana in his blood. We find no error.

" 'A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse . . . and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Brown* (2003) 31 Cal.4th 518, 534, quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10, citation omitted.)

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[7] Yoshida also cites *People v. Perez* (2004) 118 Cal.App.4th 151, in which the Court of Appeal found that evidence of several shootings over the course of a week, as well as a beating six years earlier, did not establish that a gang consistently and repeatedly committed enumerated criminal acts. (*Id.* at p. 160.) This case is inapplicable here, as Shaldjian testified to the daily commission of crimes by the Highland Park gang.

During trial, defense counsel expressed a desire to question Dr. Juan Carillo, a medical examiner, regarding a toxicology report Dr. Carillo ordered for Stittiams. The court stated that the report was irrelevant and hearsay unless Dr. Carillo relied on the report in determining the cause of death. Both the prosecution and defense counsel questioned Dr. Carillo outside the presence of the jury, and Dr. Carillo testified that he had not relied on the report in reaching his opinion regarding cause of death. The court therefore prohibited defense counsel from asking Dr. Carillo about the report in front of the jury. The court said it would be a "different story" if defense counsel wished to call the toxicologist to testify. Defense counsel said it was "in the process of doing that."

Later, during a discussion about jury instructions, the court stated that the toxicology evidence might be relevant if there was evidence of self-defense, but substantial evidence in fact indicated that Yoshida provoked the fight. Defense counsel argued the toxicology evidence would be relevant to show the victim was "[e]nticing, engaging in, egging on and maybe being the guy who challenged for the fight." The prosecution responded that in order to avoid misleading the jury, the defense would need "to have an expert come and explain how that drug was in the system, how long the drug was in the system and whether or not it even affected the body."

Ultimately, defense counsel did not call a toxicologist as a witness and the toxicology report was never introduced.

On appeal, Ramirez argues that evidence that Stittiams had methamphetamine in his blood "w[as] relevant to explain the victim's actions immediately preceding his death," including whether he instigated the confrontation. "A reasonable juror," he

claims, "might have doubted evidence of S[t]ittiams' aggression." Ramirez asserts that evidence of Stittiams' behavior would, "in turn inform[] the stabber's and Ramirez's respective behavior when faced with an amped up fighter." Ramirez believes the toxicology report "undercut the prosecution's theory that Ramirez (or Yoshida) planned, or had the specific intent to commit murder, or any felony for which murder was a natural and probable consequence, when Yoshida first approached Stittiams."

We fail to see how the presence or absence of methamphetamine in the victim's body explains anything of relevance in this case, or undercuts any theory of the prosecution. Indulging Ramirez's speculation that Stittiams was highly aggressive or an "amped up fighter," that still does not explain why Ramirez and Yoshida, rather than driving away and avoiding a confrontation, chose to turn their car around and pull up to Stittiams, at which point Yoshida attacked him. Although Stittiams purportedly took off his shirt, threw his arms in the air, and exchanged harsh words with the defendants, there is no evidence in the record that he threw the first punch or otherwise forced the defendants to engage him in combat. All evidence points to Yoshida and Ramirez being the initial aggressors. Ramirez offers no explanation as to how he or Yoshida would have acted differently based on the level of controlled substances in the victim's body, and we can conceive of no such explanation on the record before us. To the extent Ramirez seeks to argue that evidence that Stittiams was unexpectedly "amped up" would support a claim of self-defense, defense of another, or provocation, those theories are foreclosed, as discussed above.

We also agree with the prosecution that the toxicology evidence could have no relevance without an expert to explain it

to the jury. Without such expert testimony, the jury would be left to speculate as to the effects of the chemicals on the victim's body and how it might have affected his behavior. Ramirez argues that the medical examiner was qualified to offer expert testimony regarding "the effects of methamphetamine and marijuana on the human body and mind," but nothing in the record indicates that. The trial court rightly excluded the evidence in the absence of such an expert. But even had the defense called a toxicologist, we continue to be unconvinced that the evidence would have any bearing on this case.[8]

Given the lack of relevance of the toxicology report, the trial court properly exercised its discretion in excluding it.

6. Admission of Gang-related Evidence

Yoshida and Ramirez raise numerous claims that the trial court erred in admitting evidence against them pertaining to their gang membership. We review the trial court's evidentiary rulings, including on gang evidence, for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) We recognize that evidence of gang membership can be highly inflammatory, and trial courts must take care in admitting it, even when relevant. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) For the reasons discussed below, we affirm the trial court's rulings.

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[8] Ramirez argues that defense counsel was entitled to cross-examine the medical examiner as to why he did not rely on the toxicology report in forming his opinion as to cause of death. We disagree. Such questions might be fair if defense counsel put forth any reasonable explanation as to why the medical examiner *should* have relied on the report. In the absence of such explanation, the court was within its discretion to prohibit questions regarding the report.

a. Gang Tattoos

Yoshida argues that the court improperly admitted evidence of his past crimes through testimony regarding his gang tattoos. During trial, the prosecution called Officer Juan Aguilar, who testified regarding Yoshida's tattoos. The prosecution asked Aguilar whether gang members had to "earn their tattoos." Defense counsel objected on grounds of relevance and Evidence Code section 352, but was overruled. Aguilar responded: "No, you need to earn it. Just because you're a gang member doesn't mean you have tattoos. I've come across gang members that are die-hard gang members that do not have any tattoos. But the ones that do get them is [*sic*] because they earn it. They either go out and commit certain crimes, whether robbery, a shooting or even if it's tagging up a bunch of walls. They have to earn it. They have to show to their gang buddies they are from the gang. So then once they are vouched for, they can go out and get a tattoo on their body." Yoshida's counsel called for a sidebar and moved for a mistrial, arguing that Aguilar's testimony constituted evidence that Yoshida had committed past crimes. The court denied the motion.

On appeal, Yoshida argues that this testimony was admitted in violation of Evidence Code section 1101, subdivision (a), which states that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Yoshida argues that evidence of his "commission of prior crimes as evidenced by his numerous gang tattoos . . . was irrelevant for any purpose other than for the impermissible purpose of showing his disposition to commit such

crimes." Yoshida also argues that the evidence should have been excluded under Evidence Code section 352, which permits the trial court at its discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Yoshida asserts that his gang membership was not in dispute, so the probative value of the evidence concerning his tattoos was minimal compared to its prejudice.

We disagree. As Yoshida acknowledges, Evidence Code section 1101, subdivision (b) states that "evidence that a person committed a crime" may be admitted "when relevant to prove some fact . . . other than his or her disposition to commit such an act," including motive. (See *People v. Williams*, *supra*, 16 Cal.4th at p. 193 ["[I]n a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect."].) The prosecution alleged that Yoshida had committed murder "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members," an allegation that, if found true, would affect his sentence. (See Pen. Code, § 186.22, subd. (b)(4).) Yoshida's tattoos, and the officer's observation that they may have been earned through the commission of other crimes, were relevant to prove that Yoshida had a motive to commit crimes for the benefit of the gang, as doing so potentially would result in him earning more tattoos and enhancing his reputation. The evidence also tended to show that Yoshida was or had been an active member of the gang. Thus, the evidence was offered for a

legitimate reason apart from Yoshida's propensity to commit crimes. The evidence was also probative, and the trial court was within its discretion in finding that the probative value of the evidence outweighed its prejudicial effect.

b. Ramirez's Brother's Murder Conviction

Yoshida and Ramirez both claim that the trial court improperly admitted evidence of the murder conviction of Ramirez's older brother. The prosecution introduced this evidence as one of the predicate offenses necessary to establish the gang enhancement. A police officer also testified regarding the prior murder when describing a tattoo on Ramirez's arm that purportedly commemorated the crime. Defense counsel timely objected to the introduction of this evidence, but was overruled.

Yoshida and Ramirez argue that the prosecution could have used other crimes to establish the predicate offenses, so there was no need to introduce the brother's conviction. They assert that the effect of introducing evidence of a murder committed by Ramirez's brother prejudiced Ramirez and Yoshida by making them guilty by association. Thus, they claim, the probative value of the murder conviction was outweighed by its prejudicial effect, in violation of Evidence Code section 352.

We disagree. Our Supreme Court has held that it is permissible to introduce evidence of a defendant's *own* past crimes to establish the predicate offenses required for a gang enhancement, even when the predicate offenses may be established by other evidence, so long as the evidence is not unduly prejudicial. (*People v. Tran* (2011) 51 Cal.4th 1040, 1048-1049 ["That the prosecution might be able to develop evidence of predicate offenses committed by other gang members therefore does not require exclusion of evidence of a defendant's own

separate offense to show a pattern of criminal gang activity."].) Given this holding, there is certainly no bar to the admission of evidence of crimes committed by *relatives* of the defendants, as such evidence would be even less prejudicial than crimes committed by the defendants themselves.[9] While it is conceivable that under some circumstances evidence of a relative's past crimes would be so prejudicial as to require exclusion under Evidence Code section 352, Yoshida and Ramirez have not explained why this is such a case, and we decline to find that the trial court abused its discretion.[10]

c. Cumulative Gang Evidence

Ramirez argues that additional gang-related evidence offered by the prosecution was "extensive, cumulative, and unduly prejudicial." Specifically, he points to (1) the testimony of six police officers regarding their contacts with Yoshida and Ramirez during which the defendants asserted their gang membership; (2) an officer's testimony that Ramirez refused to cooperate in the investigation of a shooting of which Ramirez was the victim; and (3) the testimony of the prosecution's gang expert, which Ramirez characterizes as including, inter alia, information about Ramirez's brother's murder conviction (discussed above), other offenses committed by Highland Park gang members, and

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9 In Yoshida's case, his claim of connection to Ramirez's brother is more tenuous than a family relationship: he bases it on the fact that he was dating Ramirez's sister and living with her and Ramirez.

10 The evidence of Ramirez's brother's conviction was additionally probative to explain Ramirez's commemorative tattoo, which tended to prove Ramirez's connection to the gang of which his brother was a member.

the expert's opinion that Yoshida and Ramirez were active gang members. Ramirez argues that "[t]he sheer volume of evidence served only as propensity evidence that prejudiced Ramirez unduly."

We disagree. As discussed above, the prosecution was seeking a sentence enhancement that required proof that the crime was committed for the benefit of a criminal street gang. The prosecution was entitled to offer evidence that Ramirez was a member of the Highland Park gang, a point Ramirez's counsel contested at trial. The evidence that Ramirez did not cooperate in the investigation of his own shooting was properly offered for this point, as the prosecution could argue that this indicated that Ramirez was "intertwined and part of the gang culture," as the trial court said. The prosecution was also entitled to offer evidence of prior offenses committed by Highland Park members, as required to satisfy section 186.22, subdivision (e).

The cases discussed by Ramirez in which gang evidence was found inadmissible are inapposite. *People v. Leon* (2008) 161 Cal.App.4th 149 held that admitting evidence of a defendant's uncharged offense was unduly prejudicial (*id.* at p. 169); no such evidence was offered against Ramirez. In *People v. Albarran* (2007) 149 Cal.App.4th 214, the question before the Court of Appeal was whether gang evidence was relevant once the trial court had dismissed the gang enhancement allegations. (*Id.* at pp. 222-223.) Here, the gang enhancement allegation was not dismissed. *People v. Borjorquez* (2002) 104 Cal.App.4th 335 did not involve gang enhancements, but only whether gang evidence was relevant to bias, an issue not present in this case. (*Id.* at pp. 337, 344-345.) *People v. Williams* (2009) 170 Cal.App.4th 587 found gang evidence to be cumulative and prejudicial when the

prosecution offered "evidence of dozens of prior crimes" by gang members, including evidence of the defendant's prior crimes and arrests, and the trial court was overburdened with evidentiary disputes that the Court of Appeal likened to "a virtual street brawl." (*Id.* at pp. 610-611.) No such circumstances exist here, as the prosecution offered only four examples of prior offenses (none committed by Ramirez) and the record does not indicate an excess of evidentiary disputes. *People v. Hill* (2011) 191 Cal.App.4th 1104 distinguished *Williams, supra*, 170 Cal.App.4th 587 and found no prejudice when the trial court admitted evidence of eight predicate offenses (*Hill*, at pp. 1138-1139); it offers no support to Ramirez's arguments.

7. Prosecutorial Misconduct

Ramirez claims three instances of misconduct by the prosecution. We hold that none compels reversal. We discuss each in turn.

a. First Instance

During rebuttal closing argument, the prosecution said: "You must consider all the evidence, and you should use common sense. Once again, statements of the attorneys are not evidence. The jury instructions said that even the questions asked by counsel are not evidence. It is the answer given by the witness that's the evidence, and if the attorney's question actually helps you understand the answer. Because during this trial, *defense tried very hard to get the witnesses to say something that was not the truth*. Those are not evidence." (Italics added.) Defense counsel objected that this was "improper argument." The trial court overruled the objection.

Ramirez argues that the italicized portion of the statement "[i]mpugn[ed] the integrity of defense counsel" and constituted

"serious misconduct by the prosecutor." Indeed, "[i]f there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.)

We disagree that the prosecution's statement was an attack on defense counsel's integrity, or would appear to the jury as an accusation of dishonesty. Instead, the prosecution was emphasizing to the jury that defense counsel's questions were designed to elicit responses helpful to their clients, responses that the prosecution unsurprisingly did not consider to be true. The prosecution was reminding the jury not to regard those questions as evidence, and warning that to do so would mean to accept an untrue version of the facts.

"It is not . . . misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence." (*People v. Huggins* (2006) 38 Cal.4th 175, 207 (*Huggins*).) In *Huggins*, the prosecution said of defense counsel's version of events, " 'None of this can be true. Please believe me. He has lied through his teeth in trying to sell this story to you.' " (*Id.* at p. 206.) The Supreme Court concluded this did not constitute misconduct: "Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument, and that is essentially what the prosecutor did here." (*Id.* at p. 207.)

The prosecution's comments here are far milder than the statements found not to constitute misconduct in *Huggins*, which

declared defense counsel's entire interpretation of the facts to be false, and asserted that defense counsel was lying "through his teeth." (*Huggins, supra*, 38 Cal.4th at p. 206.) And, similar to *Huggins*, the prosecution's statements urged the jury to accept the prosecution's version of events rather than the version that defense counsel were attempting to elicit through their questions. The statement did not, as Ramirez contends, "challenge an attorney's personal honesty in front of the jury."

Even if the prosecution's statement constituted misconduct, it was an isolated comment in a lengthy closing, and was not the central focus of the argument. Any prejudice caused to the defense would be minimal and not warrant reversal. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 744 [no prejudice when prosecution's improper statement was "solitary and brief"].)

b. Second Instance

Yoshida's half-brother, Robert Astorga, was initially arrested as a suspect in the murder. In closing, defense counsel repeatedly suggested that the police knew that Astorga was the true culprit, but the district attorney had made an "administrative decision to cut Robert loose" and charge Yoshida and Ramirez instead. Defense counsel claimed that as a result of this "administrative decision," the prosecution "had to attack their own eyewitnesses" to the extent their accounts did not support the prosecution's theory.

In rebuttal, the prosecution made the following statement: "Just because someone gets arrested doesn't mean you take them to trial. That doesn't mean, as a prosecutor, you file a charge against them. Prosecution only files charges when they believe they can prove the facts beyond a reasonable doubt. That's why Robert Astorga is walking free on the streets. That's why Robert

Astorga is not sitting where these defendants are sitting. You know, somehow we had something against these two, but not that guy. Their argument bites them back because if that guy was so violent and so gang member and so felon, why not just have him sit there? *We don't—we don't prosecute people we don't have evidence against.* We have plenty of people committing crimes in L.A. County. *We don't prosecute innocent people.*" (Italics added.) Ramirez contends that the italicized statements constitute misconduct.

Defense counsel neither raised an objection to the statement at trial nor requested an admonition to the jury to disregard the purported impropriety. There is no reason to believe that an admonition would have been ineffective. Thus, Ramirez has forfeited the issue on appeal.[11] (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.)

Even had Ramirez preserved the issue, there would be no prejudice requiring reversal. As a general matter, it is improper for a prosecutor to suggest that he or she would not have brought the case unless he or she believed the defendant was guilty. (See *People v. Kirkes* (1952) 39 Cal.2d 719, 723; see also 5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 772, pp. 1198-1200.) In this circumstance, however, the prosecution was responding to a repeated suggestion by defense counsel that the prosecution had released the actual murderer based on an "administrative decision." The jury would likely take the

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[11] Ramirez argues that his claims regarding the second and third instances of purported prosecutorial misconduct were not forfeited, despite a lack of objection below. We decline to address this argument. As we discuss below, we would reject both claims even had they been properly preserved.

prosecution's comments as an explanation for that purported decision, that is, that the evidence did not support holding Astorga. Although the logical extension of the prosecution's statement that it would not prosecute Astorga if he were innocent was that it was prosecuting Yoshida and Ramirez because they were guilty, the required inference softens the effect of the argument and makes it less likely the jury was improperly influenced by it.

Moreover, to the extent there was confusion about Astorga's involvement, it related to who actually was present at the time of the homicide; defense counsel argued Astorga was there, and the prosecution argued there was no evidence that was so. But this argument was inconsequential as to Ramirez who, as discussed earlier, made a clear admission to the police that he was present, and that he came out of his car with a knife. Even assuming there was a question as to whether Astorga was there, Ramirez's own statement left little doubt that he himself was, regardless of any argument by the prosecution.

c. Third instance

In closing rebuttal, the prosecution asserted that defense counsel was creating "smoke screen[s] to try to discredit witnesses and attack the prosecutor." The prosecution admonished the jury: "That's not your job. Your job is to seek the truth in this case and not search for doubt. They are asking you to search for doubt. Your job is to seek the truth and get justice in this case." Ramirez contends that this statement "told jurors essentially to ignore doubt or disregard it," thus improperly diminishing the standard of proof. Ramirez also argues that the admonishment suggested it was the jury's duty to find the defendants guilty.

Again, defense counsel did not object to this statement at trial, and there is no indication an admonition would have been ineffective. Thus, Ramirez has forfeited this claim on appeal. (*People v. Cunningham*, *supra*, 25 Cal.4th at pp. 1000-1001.)

Even were we to reach the issue, on the merits we find no misconduct under these circumstances. The prosecution's statement was in line with the court's instruction to the jury regarding reasonable doubt: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." In other words, the court instructed the jury to determine whether the charge was true, and not to struggle unnecessarily with eliminating all possible doubt. Similarly, the prosecution cautioned that the jury need not seek reasons to doubt when the truth was otherwise evident. The prosecution did not suggest that the jury ignore or disregard doubts that were reasonable.

Nor does the record reveal any indication that the prosecution expressly or impliedly told the jurors that it was their duty to convict. The admonition to "get justice" presumably would be served equally by an acquittal if that was the jury's verdict.

8. Instructional Error as to Natural and Probable Consequences

Yoshida and Ramirez argue that the jury instructions allowed them to be convicted of first degree murder under the natural and probable consequences theory of aiding and abetting, an outcome barred by *Chiu, supra*, 59 Cal.4th 155. For the

reasons below, we reverse the conviction of Ramirez. We find there was no reversible error as to Yoshida.

Chiu, which was decided approximately seven months before the trial here, held "that an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu, supra*, 59 Cal.4th at pp. 158-159.) *Chiu* further held that "when a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Id.* at p. 167.) Yoshida and Ramirez's first degree murder convictions must be reversed unless we can conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*Ibid.*)

a. Ramirez

In regards to Ramirez, the jury was instructed on two theories of aiding and abetting: first, under CALCRIM No. 401, that Ramirez directly aided and abetted the murder of Stittiams; and second, under CALCRIM No. 403, that Ramirez was guilty of assault with a deadly weapon, a natural and probable consequence of which was the commission of murder. The court instructed the jury separately on first and second degree murder; at no point did the court instruct the jury that it could not find Ramirez guilty of first degree murder under the natural and probable consequences theory.

The prosecution relied on both theories in its closing. It emphasized to the jury that "you all don't have to agree on the theory. Some can agree to aiding and abetting. Some can think

natural and probable consequences. You don't have to all agree to it, but you have to agree whether it's second degree murder or first degree murder, but you don't all have to agree on the theory."

During deliberations, the jury sent a note asking: "Are we deciding that Ramirez aided and abetted a 1st degree murder? [Or a]re we deciding if Ramirez committed a 1st [d]egree [m]urder?" The court responded, "Both, but all of you do not have to agree on which theory he is guilty of murder."

As respondent concedes, it was error for the trial court to instruct the jury that it could convict Ramirez for first degree murder based on a natural and probable consequences theory. Because the jury was instructed on two theories of guilt, one legally correct and one not, we must reverse unless we can conclude beyond a reasonable doubt that Ramirez was convicted on the legally correct theory of direct aiding and abetting.

We cannot so conclude. The jury was instructed on both theories and was told twice, once by the prosecutor and once by the court, that it could convict on either one, even if individual jurors did not agree which theory applied. In its closing, the prosecution presented scenarios in support of both theories: either that Ramirez turned his car around so that he and Yoshida could kill Stittiams, or that Ramirez only intended to commit an assault, the felony underlying the natural and probable consequences instruction. Under these circumstances, we cannot be certain beyond a reasonable doubt that no juror chose to convict under the impermissible theory.

Respondent argues that the note sent from the jurors indicates that they were "focused on who was the direct perpetrator and who directly aided and abetted in the murder,"

and therefore not considering the natural and probable consequences theory. Although this is a plausible interpretation of the note, it does not eliminate all reasonable doubt: the question may not have come from all the jurors (some of whom may have been focused on the natural and probable consequences theory), or the reference to "aiding and abetting" may have been intended to incorporate both the direct and natural and probable consequences theories, as both were presented to the jury as versions of aiding and abetting.

Nor do we agree with respondent that "[t]he evidence strongly suggests that appellant Ramirez shared appellant Yoshida's intent to kill." This claim is belied by the prosecution's own closing argument, which presented a plausible scenario in which Ramirez merely intended to commit an assault. Although it is certainly possible that Ramirez shared the intent to kill, we cannot say beyond a reasonable doubt that all jurors made that determination.

We reverse Ramirez's conviction for first degree murder. The People may accept a reduction of the conviction to second degree murder or retry the case and seek a first degree murder conviction under a legally permissible theory. (See *Chiu*, *supra*, 59 Cal.4th at p. 168.)

b. Yoshida

As Yoshida concedes, the jury instructions regarding natural and probable consequences pertained only to Ramirez, and the prosecution's theory was that Ramirez, not Yoshida, was the aider and abettor. Thus, Yoshida could not have been convicted of first degree murder under this legally impermissible theory, and his conviction must stand.

Yoshida argues that the jury's note asking whether it was deciding whether Ramirez committed a first degree murder indicates that some jurors may have decided that Ramirez, not Yoshida, was the direct perpetrator. In that scenario, Yoshida argues, the jurors would find him to be the aider and abettor, potentially under the natural and probable consequences theory. We find this interpretation implausible beyond a reasonable doubt. There was no basis on which the jury could find that Ramirez, as opposed to Yoshida, was the direct perpetrator. The prosecution presented no evidence or argument that Ramirez was the direct perpetrator, and as discussed earlier, the jury instructions regarding aiding and abetting referred only to Ramirez.

9. Cumulative Error and Ineffective Assistance of Counsel

Yoshida and Ramirez argue that to the extent any of their claimed errors do not themselves compel reversal, the cumulative effect of those errors does. Ramirez additionally makes a claim of ineffective assistance of counsel to the extent several of his arguments were forfeited on appeal because trial counsel failed to object.

We do not agree. As discussed, the instructional error regarding the natural and probable consequences doctrine requires reversal of Ramirez's conviction. To the extent there were any other errors, they played no part in the jury's decision, and cumulatively neither require reversal nor a finding that Ramirez's counsel was ineffective.

DISPOSITION

The judgment against Yoshida is affirmed. Ramirez's conviction for first degree murder is reversed. In accordance with *Chiu*, *supra*, 59 Cal.4th 155, this matter is remanded to the trial

court with directions to allow the People to accept a reduction of Ramirez's conviction to second degree murder, or to elect to retry Ramirez for first degree murder under a theory or theories other than natural and probable consequences.

If the People elect to retry Ramirez, the true finding on the street gang enhancement is reversed as to Ramirez only, and the enhancement may be alleged again in the new trial. If the People accept the reduction of Ramirez's conviction to second degree murder, then the true finding on the enhancement is affirmed, and Ramirez shall be resentenced. If the People do not accept the reduction and, after the filing of the remittitur in the trial court, Ramirez is not retried within the time described in section 1382, subdivision (a)(2) (60 days unless waived by the defendant), the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder with the true finding on the enhancement affirmed, and shall resentence Ramirez accordingly.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.